Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally incompetent person,
Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Robert H. J. Loftus
MILES & STOCKBRIDGE
4069 Chain Bridge Road
Fairfax, Virginia 22030
(703) 273-2440
Counsel of Record for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this case involves a question of federal law?

2. Whether an adequate and independent state law ground exists for the decision below?

3. Whether a substantial question of federal law is involved in this case?

4. Whether the issues presented in this case are sufficiently important to merit review by this Court?

5. Whether the decision below was correct?

6. Whether the Virginia Supreme Court's decision that Respondent was not estopped from challenging the constitutionality of the state statute is a matter of state law?

LISTING PURSUANT TO RULE 28.1

Potomac Hospital Corporation is now Potomac Hospital Corporation of Prince William. It is a subsidiary of Potomac Health Care Corporation, which has the following subsidiaries in addition to Potomac Hospital Corporation of Prince William:

Potomac Hospital Properties

Potomac Development Corporation of Prince William

Potomac Hospital Services Corporation

Medical Center of Stafford, Inc.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	3
1. No question of federal law is involved in this case	3
2. An adequate and independent state law ground exists for the decision below	7
3. No substantial question of federal law is involved in this case	8
4. The issues presented in this case are not sufficiently important to merit review by this Court	9
5. The decision below was correct	12
6. The Virginia Supreme Court's decision that Respondent was not estopped from challenging the constitutionality of the state statute is a matter of state law	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Bisping v. Commonwealth, 218 Va. 753, 240 S.E.2d 656, *cert. denied*, 435 U.S. 1007 (1978) 17, 18

Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160 (W. D. Va. 1983) 6

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 11

Coombes v. Getz, 285 U.S. 434 (1932) 8, 11, 14, 16

Danville v. Pace, 65 Va. (25 Gratt.) 269 (1874) 6, 11

deLeo v. Childs, 304 F. Supp. 593 (D. Mass. 1969) 15

Duffy v. Hartsock, 187 Va. 406, 46 S.E.2d 570 (1948) 5, 6, 8, 11

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 16

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917) 17

Ettor v. Tacoma, 228 U.S. 148 (1913) 9, 13, 15

First Virginia Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983) 13

Goodstein v. Weinberg, 219 Va. 105, 245 S.E.2d 140 (1978) 14

Greenaway's Case, 319 Mass. 121, 65 N.E.2d 16 (1946) 15

Leonard v. Vicksburg, Shreveport and Pacific Railroad Co., 198 U.S. 416 (1905) 17

Lewis v. Glenn, 84 Va. 947, 6 S.E. 866 (1888) 13

Michigan v. Long, 463 U.S. 1032 (1983) 8

Mondou v. New York, New Haven and Hartford Railroad Co., 223 U.S. 1 (1912) 16

Nationwide Insurance Co. v. Minnifield, 213 Va. 797, 196 S.E.2d 75 (1973) 13

Norfolk & Southern R. Co. v. Beskin, 140 Va. 744, 125 S.E. 678 (1924) 16

Pension Benefit Guarantee Corporation v. Gray, ____ U.S. ____, 104 S. Ct. 2709 (1984) 10

Pierce v. Somerset Ry., 171 U.S. 641 (1898) 17

Table of Authorities Continued

Page

Potomac Hospital Corporation v. Dillon, 229 Va. ____, 329 S.E.2d 41 (1985) ..... *passim*

Reynolds v. Milk Commission of Virginia, 163 Va. 957, 179 S.E. 507 (1935) 7

Ruble v. Turner, 12 Va. (2 Hen. & M.) 38 (1808) 16

Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984) 4, 5, 6, 8

Spindel v. Jamison, 199 Va. 954, 103 S.E.2d 205 (1958) 18

Whitlock v. Hawkins, 105 Va. 242, 53 S.E. 401 (1906) 6, 8, 11

Wright v. Orlowski, 218 Va. 115, 235 S.E.2d 349 (1977) 16

CONSTITUTIONS AND STATUTES:

Constitution of Virginia, Art. I, § 11 1

Constitution of Virginia, Art. I, § 1 7

Section 8.01-35.1, Code of Virginia (1984 Repl Vol.) 2, 4, 6, 11

28 U.S.C. § 1257(3) 4

MISCELLANEOUS:

Rule 17, *Rules of the Supreme Court of the United States* 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-388

JOSEPHINE A. DILLON, Committee of
HILDA NADINE AMIDON, a legally incompetent person,
Petitioner,

v.

POTOMAC HOSPITAL CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, Potomac Hospital Corporation, respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of Virginia be denied by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Virginia, Art. I, § 11:

> That no person shall be deprived of his life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

Respondent states that the facts pertinent to this Petition for a Writ of Certiorari are adequately set forth by the

Supreme Court of Virginia in *Potomac Hospital Corporation v. Dillon*, 229 Va. ____, 329 S.E.2d 41 (1985) (hereafter referred to as *Dillon*).

Petitioner's statement that the jury found the hospital negligent is incorrect. The jury awarded damages against the hospital on the ground that it was liable *respondeat superior* for the actions of Dr. Tamase, for whose negligence Petitioner received satisfaction by settlement, and who was released by Petitioner along with the other defendants prior to trial.

Petitioner's statement that a majority of the Virginia Supreme Court held that § 8.01-35.1(D) violates due process of law is also incorrect. All of the Justices joined in the opinion save Justice Russell, whose dissent was limited to the issue of estoppel.

SUMMARY OF ARGUMENT

1. The Supreme Court of Virginia relied in this case entirely upon long established principles of Virginia law. The analysis of the issues by the Supreme Court of Virginia, and the cases cited by it, rest on doctrines of Virginia constitutional and common law. No federal question is involved in this case.

2. If the Virginia Supreme Court also relied upon principles of federal constitutional law, it is clear from the face of opinion that principles of Virginia common law and constitutional law were the primary grounds. There is an adequate and independent state law ground for the decision below.

3. The constitutional law applied in this case by the Virginia Supreme Court presents no novel issue. Accordingly, there is no substantial question of federal law involved.

4. The issues in this case ultimately turn upon principles of common law unique to the Commonwealth of Virginia.

Petitioner has cited no conflict among the decisions of the federal circuits, or conflicts among state courts of last resort. The *Dillon* decision does not involve an important question of unsettled federal law nor one decided in a way conflicting with applicable decisions of this Court. The issue presented is not sufficiently important to merit review by this Court.

5. It is well established that the legislature may not impair vested or accrued substantive rights by retroactive legislation. The Virginia General Assembly in the present case retroactively eliminated the right of contribution among joint tortfeasors and the common law defense that release of one joint tort-feasor releases all. These rights had accrued to the Respondent at the time of the incident and the Virginia Supreme Court was plainly correct in holding that they could not, by later legislation, be retroactively abrogated.

6. The Virginia Supreme Court's decision that Respondent was not estopped from challenging the constitutionality of the statute is dependent entirely upon principles of state law and involves no federal question. Petitioner relied solely upon state law principles in arguing this issue before the Virginia Supreme Court and has waived any federal question it might now seek to assert. The decision of the Supreme Court was correct in holding that the Respondent was not estopped from challenging the validity of the statute.

REASONS FOR DENYING THE WRIT

1. No Question Of Federal Law Is Involved In This Case.

The Supreme Court of Virginia held in *Dillon* that a retroactive abrogation of substantive common law rights of

joint tort-feasors by the Virginia General Assembly violated due process of law.

Petitioner invokes the jurisdiction of this Court upon its assertion that the validity of a state statute has been drawn into question as being repugnant to the United States Constitution. *See* 28 U.S.C. § 1257(3). The Supreme Court of Virginia, however, held in *Dillon* that the statute in question, § 8.01-35.1(D) of the Code of Virginia, was unconstitutional upon well established principles of Virginia law and not on the ground that it violated the United States Constitution. *Dillon*, and each of the cases it cited and relied upon, interpreted and applied principles of Virginia law that are independent of federal constitutional jurisprudence. As the decision below rested entirely upon doctrines of common law and state constitutional law, no federal question is presented.

The Supreme Court of Virginia framed the central issue in this case as follows:

> [W]hether this provision [§ 8.01-35.1] violates constitutional due process when retroactive application of the statute adversely affects a joint tort-feasor's substantive right of contribution.

Dillon, 229 Va. at ____, 329 S.E.2d at 43.

In deciding this issue, the Supreme Court of Virginia cited and relied upon its settled jurisprudence in the area of retroactivity, and not on principles of federal law.

Chief among the cases relied on in *Dillon* was *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), where the Virginia Supreme Court held that § 8.01-35.1 could not be applied retroactively. In *Shiflet*, the Supreme Court of Virginia stated:

> [T]he 1979 statute in question, which adversely affects that substantive right [of contribution between tort-feasors], cannot be applied retroactively to impair that right. *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160, 164 (W. D. Va. 1983). Such a retroactive application of the enactment would violate [defendant's] due process rights and would be invalid. *Duffy v. Hartsock*, 187 Va. at 416, 46 S.E.2d at 575. *See Strickland v. Simpkins*, 221 Va. 730, 734, 273 S.E.2d 539, 541 (1981).

228 Va. at 121, 319 S.E.2d at 754.

Each of the cases cited by the Supreme Court of Virginia, both in *Dillon* and in *Shiflet*, interpreted Virginia law and the effect to be given to a Virginia statute that retroactively affects substantive rights.

The case of *Duffy v. Hartsock*, 187 Va. 406, 46 S.E.2d 570 (1948), set forth the applicable rule of law:

> "[T]he legislature may, in its discretion, pass retrospective and curative laws, provided they do not partake of the nature of what are technically called *ex post facto* laws, and do not impair the obligation of contracts, or disturb vested rights . . . ."

Id. at 419, 46 S.E.2d at 576.

This prohibition of retroactive abrogation of common law rights is an ancient one in Virginia jurisprudence, independent of federal due process considerations:

> Now, let it be conceded there are restrictions upon the legislative power not found expressly enumerated in the constitution; that a law may not infringe upon any specific provision of that instrument and yet it may involve so flagrant an abuse of power that it is the imperative duty of the judiciary to interpose and arrest

> its execution . . . . All admit that it is not competent for the legislature by retroactive laws to interfere with vested rights.

Danville v. Pace, 65 Va. (25 Gratt.) 269, 272 (1874). *See also Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906).

The only federal case cited in *Shiflet* was *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160 (W.D. Va. 1983), where the United States District Court for the Western District of Virginia held that the retroactive application of § 8.01-35.1 violated both the Virginia and the United States Constitution. The Supreme Court of Virginia, however, carefully limited its citation in *Shiflet* to page 164 of the *Carickhoff* opinion. Page 164 of the *Carickhoff* opinion referred only to long established Virginia cases holding that the Virginia General Assembly had no power to enact retrospective legislation substantially impairing or destroying vested rights, and cited *Duffy v. Hartsock* for this proposition. *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. at 164.[1] The Supreme Court of Virginia did not cite the portion of the *Carickhoff* opinion finding a violation of the United States Constitution, but solely that portion interpreting established principles of Virginia law. No reference whatsoever is made at page 164 of the *Carickhoff* opinion to federal constitutional law.

The *Dillon* decision stands as the most recent application by the Supreme Court of Virginia of long established principles of Virginia law. All of the precedents relied upon interpret Virginia law and no reliance is found on the federal Constitution. No federal question is present in this case.

---

[1]As Judge Michael stated at page 164: "There is no lack of case law in Virginia concerning the circumstances under which legislation may be applied retroactively." *Id.* at 164.

Petitioner relies upon *Reynolds v. Milk Commission of Virginia*, 163 Va. 957, 179 S.E. 507 (1935), for its argument that all interpretations of Virginia's Due Process Clause mirror the federal Due Process Clause. *Reynolds* did not arise under the Due Process Clause of the Virginia Constitution, but rather under Article I, Section 1 thereof, titled "Equality and Rights of Men." *Reynolds* is no authority for interpretations of Virginia's Due Process Clause.

The Virginia Supreme Court's holding in *Dillon* that Respondent was not estopped from challenging the validity of the statute concerns only issues of state law in which no federal question is involved. See pp. 17-18 below.

As the Supreme Court of Virginia relied solely upon principles of state law, no jurisdiction exists in this Court to review the *Dillon* decision.

2. An Adequate And Independent State Law Ground Exists For The Decision Below.

If the Supreme Court of Virginia had decided this case on both state and federal constitutional grounds, the state law ground would be adequate to support the decision independent of any federal law.

This Court has recently enunciated the standard to be applied in determining whether a possible independent state law ground exists in a case:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

The *Dillon* opinion, however, does not rest primarily on federal law and is not interwoven with federal law. No principle of federal law, constitutional or otherwise, is cited anywhere in *Dillon*, nor are any federal cases relied upon. There is no fair reading of the *Dillon* decision which can support any inference that the Virginia Supreme Court decided *Dillon* as it did because it believed that federal law required it to do so.

On the other hand, the adequacy and independence of the state law ground is clear. Each of the cases cited and discussed is an earlier decision of the Virginia Supreme Court, which cases in turn arise from a distinct line of jurisprudence in Virginia. The cases relied upon in the controlling precedent, *Shiflet v. Eller*, also are cases interpreting principles of Virginia law. *See Duffy v. Hartsock*, 187 Va. 406, 46 S.E.2d 570 (1958); *Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906). This state law ground is independent and adequate to sustain the challenged decision.

3. No Substantial Question Of Federal Law Is Involved In This Case.

The decision below turns upon determinations by the Virginia Supreme Court of unique principles of Virginia common law relating to the accrual and vesting of causes of action and rights of defense which do not involve any question of federal law. The constitutional foundation for the holding in *Dillon* is the settled doctrine that the retroactive abrogation of substantive and accrued rights at common law is a violation of fundamental notions of due process. The application of this doctrine to the facts of this case presents no novel issues of substance meriting review by this Court.

In *Coombes v. Getz*, 285 U.S. 434 (1932), a case dealing with accrued contract rights, this Court stated:

> When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.
>
> [T]he right to enforce [the obligation under the statute], having become vested, comes within the protection of . . . the due process of law clause in the 14th Amendment, of the federal Constitution.

Id. at 445, 448. *See also Ettor v. Tacoma*, 228 U.S. 148 (1913) (dealing with vested causes of action).

Petitioner objects to the application of the principles of *Coombes* and *Ettor* to the "inchoate" right of contribution. The Virginia Supreme Court, however, rejected the argument that contribution was merely an inchoate right. It determined that the right of contribution was a substantive right under Virginia law which had become so far perfected under the facts of this case that its retroactive abrogation violated fundamental notions of due process. This holding is in accord with the well established doctrine that rights, sufficiently perfected under law, may not be impaired by retroactive legislation.

No novel or substantial issue of federal law is presented by the facts of this case which requires reanalysis of this settled concept.

4. The Issues Presented In This Case Are Not Sufficiently Important To Merit Review By This Court.

Review on a Writ of Certiorari is not a matter of right and is to be granted only "when there are special and important reasons therefor." Rule 17, *Rules of the Supreme Court of*

the United States. Rule 17 indicates the character of the reasons to be considered in determining whether the discretionary review on a Writ of Certiorari is to be exercised. Those reasons include a conflict among the federal circuits, a conflict on federal law among state courts of last resort, and a decision involving an important unsettled question of federal law or one decided in such a way as to conflict with applicable decisions of this Court.

None of the considerations above support the exercise of this Court's discretionary power to review. Petitioner has cited no conflict among the federal circuits involving issues similar to those presented in this case. No conflicting decisions involving state courts of last resort are cited, and none can be. Indeed, the only relevant issues in this case turn on principles of common law unique to Virginia and no principles of national importance are involved.

Petitioner argues that the analysis in *Dillon* fails to apply the "rational means" test set forth in *Pension Benefit Guarantee Corporation v. Gray*, ____ U.S. ____, 104 S. Ct. 2709 (1984). *Gray* is not applicable to the present case. The "rational means" test in *Gray* applies to a distinct line of authority relating to national economic legislation, not common law causes of action as involved in this case. In the context of national economic legislation, this Court stated:

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively.

Id. at ____, 104 S. Ct. at 2718. No issue of national economic policy is involved in this case.

Moreoever, in *Gray*, this Court noted that it was "eminently rational" for the Congress to conclude that the purposes of the Multi-Employer Pension Plan Amendments

Act of 1980 could be more fully effectuated if its withdrawal liability provisions were given limited retroactive effect in order to prevent withdrawals occuring during the lengthy legislative process. Conspicuously absent from Petitioner's argument in the present case is any indication of a "rational basis" for an unlimited retroactive abrogation of an accrued common law right. Petitioner cites only the rational basis for the initial enactment of the statute, i.e., a policy of encouraging settlement of legal disputes. No such rational basis exists for the retroactive application of § 8.01-35.1. The legislative policy supporting the entire statute (i.e., facilitating settlements), cannot serve as a rational basis for the subsequent amendment of the statute retroactively eliminating the accrued rights of joint tort-feasors. If this were the case, *any* retroactive statute whatsoever could be supported by a "rational basis" and the test for the constitutionality of such statutes would effectively disappear.

Petitioner also argues that the Virginia Supreme Court failed to consider whether to apply a "new standard" of due process retroactively or prospectively, and cites *Chevron Oil Co. v. Huson*, 404 U.S. 97, (1971) to support its proposition that such a decision was necessary. The Supreme Court of Virginia, however, announced no new constitutional standard. To the contrary, this case involves the retroactive abrogation of substantive common law rights which the Supreme Court of Virginia, in accord with the decisions of this Court and the courts of the states, has long held to be constitutionally impermissible. *See, e.g., Duffy v. Hartsock*, 187 Va. 406, 46 S.E.2d 570 (1948); *Whitlock v. Hawkins*, 105 Va. 242, 53 S.E. 401 (1906); *Danville v. Pace*, 65 Va. (25 Gratt.) 269 (1874). *See also Coombes v. Getz*, 285 U.S. 434 (1932). Petitioner cites no case, either from a federal court or from a supreme court of a sister state, setting forth a contrary result.

There is nothing novel or unique in the Supreme Court of Virginia's application of the long established doctrine prohibiting retroactive abrogation of accrued common law rights. None of the factors necessary to render this case worthy of Supreme Court review are present.

5. The Decision Below Was Correct.

Petitioner's statement of the Virginia Supreme Court's holding in this case is incorrect. Petitioner states that the Virginia Supreme Court "has pronounced that a legislative body, even with clear expression of its intent, cannot constitutionally enact a statute that retroactively alters a mere inchoate right". *Petition for a Writ Certiorari*, p. 5.

The *Dillon* opinion, however, held that the statute in question retroactively *eliminated* both a substantive common law cause of action (contribution) and a vested common law defense (release of one tort-feasor releases all). Petitioner's statement that this is a principle of constitutional law which has never been accepted by any court, state or federal, is incorrect. It has always been the law that accrued common law causes of action and defenses may not be retroactively eliminated by statute.

a. The retroactive abrogation of common law causes of action is a violation of due process.

The Virginia Supreme Court has determined in this case that the right of contribution among joint tort-feasors became sufficiently perfected upon the occurrence of the incident giving rise to liability among the joint tort-feasors that its retroactive abrogation violated due process of law.

In reaching this decision, the Supreme Court of Virginia analyzed the distinction between a "cause of action" and a "right of action," the former accruing at the time of the jointly negligent acts and the latter when one joint tort-

feasor pays a disproportionate amount of a claim for which other joint tort-feasors are also liable. *Dillon*, 229 Va. at ____, 329 S.E.2d at 44, n.3. This distinction, long established in Virginia law, has been held by the Supreme Court of Virginia to be a "distinction *with* a difference". *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983)(emphasis in original). *See also Nationwide Insurance Co. v. Minnifield*, 213 Va. 797, 799, 196 S.E.2d 75, 77 (1973); *Lewis v. Glenn*, 84 Va. 947, 979, 6 S.E. 866, 882 (1888). The Court pointed out that the cause of action for contribution was "inchoate" in the limited sense that suit by one tort-feasor against another could not be brought until payment, that is, until the *right* of action had accrued. That concept, however, was irrelevant to this case, for here the issue was when the *cause of action* accrued under Virginia law and was therefore no longer capable of being retroactively abrogated. The Supreme Court of Virginia held in *Dillon* that the cause of action for contribution accrued at the time of the accident.

There is nothing constitutionally novel in *Dillon*. A similar result was reached by this Court under an analogous set of facts. In *Ettor v. Tacoma*, 228 U.S. 148 (1913), plaintiff brought suit against the City of Tacoma, Washington under a statute requiring municipalities to make compensation for consequential damages due to street grading. While the action was pending, the statute was repealed and the trial court directed a verdict for the municipality under the theory that the right of action, which was merely statutory, failed when the statute was repealed without a saving clause. This judgment was reversed by this Court:

> The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The

> obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. . .
>
> The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.

Id. at 155-56. *See also Coombes v. Getz*, 285 U.S. 434 (1932).

The circumstances in the present case are similar. Here, the Respondent's cause of action for contribution arose at the time of the tort. Nothing remained to be done by the Respondent to complete its right to compensation except the ascertainment of the amount of damages. Although "inchoate" in this limited sense, the cause of action for contribution was nevertheless "so far perfected that nothing remain[ed] to be done by the party asserting it" and was entitled to constitutional protection. *Coombes v. Getz*, 285 U.S. at 445.

Petitioner also argues that contribution, as a statutory right under Virginia law, is subject to retroactive abrogation after accrual. The Supreme Court of Virginia has consistently refused to allow retroactive abrogation of *any* substantive right, whether based upon statute or upon the

common law. *See e.g., Goodstein v. Weinberg*, 219 Va. 105, 245 S.E.2d 140 (1978).

The Virginia rule that the legislature may not retroactively impair substantive rights is in accord with the rule applied in other states. The long established principle governing retroactivity of statutes states that only statutes relating to procedural matters, and not those affecting substantive rights, are to be treated as operating retroactively:

> The distinction thus drawn between statutes which adversely affect vested, substantive rights and those statutes which affect only the remedies available for enforcement of pre-existing substantive rights has been justified on the ground that, if the former "were construed to operate retroactively, at least insofar as the previously acquired rights of individuals were affected, there might be hardship *as well as constitutional difficulties*."

deLeo v. Childs, 304 F. Supp. 593, 596-97 (D. Mass. 1969), *quoting Greenaway's Case*, 319 Mass. 121, 123, 65 N.E.2d 16, 18 (1946) (emphasis added). *Accord Ettor v. Tacoma*, 228 U.S. 148 (1913).

The *Dillon* decision is in accord with this doctrine and was plainly correct under long established principles of constitutional law.

b. The retroactive abrogation of a vested common law defense is a violation of due process.

Dillon also held that the statute in question retroactively "eliminates the long standing common law defense that the release of one joint tort-feasor releases all." *Dillon*, 229 Va. at ____, 329 S.E.2d at 45. Before the enactment of the statute, Virginia had consistently followed the strict common law rule that a release of one tort-feasor releases all

joint tort-feasors. *See Wright v. Orlowski*, 218 Va. 115, 235 S.E.2d 349 (1977); *Ruble v. Turner*, 12 Va. (2 Hen. & M.) 38 (1808). The Supreme Court of Virginia has observed that "the rule is one of ancient origin, honored without exception in this Commonwealth, and fully familiar to bench and bar." *Wright v. Orlowski*, 218 Va. at 123, 235 S.E.2d at 354.

The statute in question in this case retroactively abrogated this ancient common law defense. Petitioner makes the bold assertion that retroactive elimination of a common law defense does not violate due process of law, and cites *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), as authority. *Duke Power* is not such authority.

The exact portion of *Duke Power* cited by Petitioner stands simply for the proposition that a person has no vested interest in the prospective continuation of a rule of common law and that such rules may be altered prospectively by statute. The case does not stand for the proposition that common law rights, once accrued, may be so abrogated.

It has long been the law that a right created under common law, once perfected, cannot be taken away without violating due process. *Coombes v. Getz*, 285 U.S. 434 (1932); *Mondou v. New York, New Haven and Hartford Railroad Co.*, 223 U.S. 1 (1912).

In *Dillon*, the Supreme Court of Virginia held that the common law defense that release of one joint tort-feasor releases all was the established law at the time of the alleged malpractice "when the rights and obligation of the parties were determined." *Dillon*, 229 Va. at ____, 329 S.E.2d at 45. *See also Norfolk & Southern R. Co. v. Beskin*, 140 Va. 744, 747, 125 S.E. 678, 679 (1924). The holding in *Dillon* that the retroactive elimination of this common-law defense violated due process of law was plainly correct.

6. The Virginia Supreme Court's Decision That Respondent Was Not Estopped From Challenging The Constitutionality Of A State Statute Is A Matter Of State Law.

Petitioner argues that the Virginia Supreme Court's application of the common law doctrine of estoppel to the facts of this case was incorrect and should be reversed by this Court. This issue, however, is dependent upon state law principles of estoppel and involves no federal question. As Petitioner relied in the Virginia Supreme Court solely upon state law principles of estoppel, Petitioner waived any federal question it might seek to assert by failing to raise it in a timely manner for decision below. Regardless of the presence or absence of a federal question, it is clear that the decision of the Virginia Supreme Court was correct.

In *Dillon*, the Virginia Supreme Court stated that the issue of estoppel to challenge a state statute turns, under Virginia law, on whether one "voluntarily proceeds" under the statute. *Dillon*, 229 Va. at ____, 329 S.E.2d at 43. *See also Bisping v. Commonwealth*, 218 Va. 753, 240 S.E.2d 656, *cert. denied*, 435 U.S. 1007 (1978). The Virginia Supreme Court held that the respondent did not request the application of the statute but rather "vigorously challenged its application throughout the trial" and was therefore not estopped. *Dillon*, 229 Va. at ____, 329 S.E.2d at 44.

A state court's decision on estoppel to assert a right, even a federal constitutional right, is not a federal question, but rather one of state law. *See Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917); *Pierce v. Somerset Ry.*, 171 U.S. 641 (1898). The issue of estoppel decided upon principles of state law is not within the jurisdiction of this Court to review. *Leonard v. Vicksburg, Shreveport and Pacific Railroad Co.*, 198 U.S. 416 (1905).

If there is any federal question involved in the issue of estoppel, Petitioner failed to raise it in the Virginia Su-

preme Court. Petitioner relied in the Virginia Supreme Court on the cases of *Bisping v. Commonwealth*, 218 Va. 753, 240 S.E.2d 656, *cert. denied*, 435 U.S. 1007 (1978) and *Spindel v. Jamison*, 199 Va. 954, 103 S.E.2d 205 (1958), both of which were earlier decisions of the Virginia Supreme Court. No issue of federal law was raised by the Petitioner concerning the issue of estoppel in the Virginia Supreme Court, and Petitioner has now waived such arguments and may not pursue them in this Court.

The decision of the Supreme Court on the issue of estoppel was plainly correct. Petitioner would have this Court hold that to preserve a constitutional challenge to a statute, a litigant must waive all objection to the construction of the statute and forego defense of its application to him on the merits. The Supreme Court of Virginia's decision properly recognized the injustice of such a result, and is plainly correct.

CONCLUSION

For these reasons, a Writ of Certiorari should not be issued to review the judgment and opinion of the Virginia Supreme Court.

Respectfully submitted,

Robert H. J. Loftus
Counsel for Respondent
MILES & STOCKBRIDGE
4069 Chain Bridge Road
Fairfax, Virginia 22030

Attorneys for Respondent:
Gerald R. Walsh
William L. Carey
MILES & STOCKBRIDGE
4069 Chain Bridge Road
Fairfax, Virginia 22030
(703) 273-2440